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Issue Date: 29 September 2006

CASE NO.: 2005-LHC-02240
OWCP NO.: 01-152006

In the matter of:

F.F.
Claimant

v.

ATKINSON CONSTRUCTION COMPANY
Employer

and

TRAVELER'S INSURANCE COMPANY
Carrier

APPEARANCES:

Jan Marie Toker, Esq., and James Case, Esq., McTeague, Higbee, Case, Cohen Whitney & Toker, P.A., Topsham, Maine, for the Claimant

Richard Van Antwerp, Esq., Robinson, Kriger & McCallum, Portland, Maine, for the Employer/Carrier

Before: COLLEEN A. GERAGHTY,
Administrative Law Judge

DECISION AND ORDER GRANTING MODIFICATION AND AWARDING BENEFITS

I. Statement of the Case

This matter involves cross motions for modification of an award of compensation benefits to F.F. ("Claimant") against Atkinson Construction Company, ("Employer") and its insurance carrier, Travelers Insurance Company ("Carrier"), under the Longshore and Harbor

Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* ("Act"). After suffering an injury to the right elbow, right shoulder and neck on April 11, 2000, the Claimant was awarded temporary total disability compensation benefits pursuant to a decision and order by Administrative Law Judge Daniel J. Roketenetz which was issued on December 13, 2002. The Claimant and the Employer/Carrier have filed for modification of Judge Roketenetz's decision and order.

Judge Roketenetz's Decision and Order awarded the Claimant temporary total disability benefits beginning April 26, 2000, as well as medical benefits for the Claimant's work-related right elbow, right shoulder and neck injuries. OALJ No. 2001-LHC-02590 (Dec. 13, 2002) (unpublished).[1] Administrative Law Judge Roketenetz applied the doctrine of collateral estoppel after determining that the burdens of proving causation under the Maine Workers' Compensation Act and the Longshore Act were essentially the same. *Id.* at 5-6. Therefore, he adopted the findings of the Maine Workers' Compensation Board that the Claimant's right elbow, right shoulder and neck pain were causally related to his work at Atkinson Construction. *Id.* at 6, 9. Judge Roketenetz concluded that the burdens of proof on the issue of the nature and extent of disability under the Maine and the federal statutes were materially different and therefore he did not adopt the findings of the Maine Board on this issue. *Id.* at 6-7. Instead Judge Roketenetz independently analyzed the facts with regard to the nature of the disability, and as no medical evidence was submitted showing the Claimant had reached maximum medical improvement, Judge Roketenetz determined that the Claimant's disability was temporary. *Id.* at 10. Judge Roketenetz found that the Claimant established that he could not return to his previous employment, and the Employer failed to establish that suitable alternate employment existed. *Id.* at 10-13. Therefore, the Judge concluded that the Claimant's disability was total. *Id.* at 13.

The present matter was referred to the undersigned administrative law judge, and a formal hearing was held on December 21, 2005, in Portland, Maine. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer and Carrier. The hearing afforded all parties an opportunity to present evidence and oral argument. The Hearing Transcript is referred to herein as "TR". Testimony was heard from the Claimant. Documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-12 and Employer's Exhibits ("EX") 1-3. TR 10-11. Formal papers were admitted as Administrative Law Judge Exhibits ("ALJX") 1-6. TR 11-13. Stipulations were read into the record. TR 6-7. Following the hearing, the parties filed post-hearing briefs and the record is now closed.

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties have stipulated to the following: (1) the date of injury was April 11, 2000; (2) the injury arose out of and occurred in the course of employment for Atkinson Construction Company; (3) Atkinson was subject to the jurisdiction of the Longshore Act; (4) all filings were timely; (5) the Employer and Insurance Carrier are presently paying temporary total disability

[1] The December 13, 2002 Decision and Order was submitted as an exhibit by the Claimant as part of CX 10.

compensation benefits pursuant to Administrative Law Judge Roketenetz's Decision and Order; and (6) the Claimant's average weekly wage at the time of injury was $1,097.55. TR 6-7.

The issues to be resolved are:

1. whether the Employer/Carrier have established that the Claimant's current disability is the result of an independent intervening cause, such that it is entitled to a modification of the prior order;
2. whether the Claimant has established that he now has a permanent impairment, such that he is entitled to a modification of the prior order; and
3. whether the Claimant is entitled to medical benefits for chiropractic and massage therapy under Section 7 of the Act.

III. Findings of Fact and Conclusions of Law

A. Claimant's Testimony

The Claimant was forty-eight years old at the time of the hearing, and lives in Jay, Maine, with his girlfriend. TR 18. The Claimant completed eleventh grade, and then earned his GED. *Id.* The Claimant has spent his career in heavy construction and equipment operation. *Id.*

The facts surrounding the Claimant's injury were detailed in Judge Roketenetz's decision and therefore can be summarized herein. Judge Roketenetz found that the Claimant injured himself on April 11, 2000, while helping to unload a damaged pipe. D&O Dec. 13, 2001 at 4. During the unload, the Claimant was in a "pipe rack," when the damaged pipe, which was approximately seventy to eighty feet long and ten to twelve tons, swung into position too quickly, hitting the Claimant in the right shoulder and pinning him against another pipe. *Id.* The Claimant subsequently experienced pain in his right elbow, right shoulder and neck. *Id.*; *see also* TR 19.

The Claimant testified that his condition has deteriorated since he last testified before Judge Roketenetz. TR 20. The Claimant testified that he feels worse and stated it is "[j]ust harder to get going everyday…I mean, I have more pain, I go to bed in pain, I wake up in pain." *Id.* He reported that his pain is mostly in the neck and right shoulder. *Id.* The Claimant testified that he cannot work because he has a hard time just getting out of bed in the morning and leaving the house, and he is unable to do simple tasks such as driving or housework. TR 25-27; 30. He reported that driving hurts his neck and shoulder and gives him headaches. TR 33-34. Sometimes, the Claimant testified, he attempts to vacuum or dust, but he is unable to accomplish much. TR 38. He also is unable to wash dishes in the sink because he is unable to lean over the sink. *Id.* The Claimant testified that since the prior decision, his pace of life is much slower. TR 29. He also reported that he sleeps poorly, usually two to three hours at a time. *Id.*

The Claimant treats with Dr. Leslie Harding, his primary care physician, and Dr. Saulter, his chiropractor. TR 20-22. The Claimant takes Vicodin and ibuprofen, prescribed by Dr. Harding, for pain. TR at 21. The Claimant takes between two and six Vicodin per day. TR 40.

The Vicodin relieves the Claimant's headaches somewhat, and lasts for three to four hours generally. TR 60. However, the Claimant testified that he tolerates a great deal of pain because he does not like to take the pills often. *Id.* The Claimant also reported that Vicodin does not have any side effects. *Id.*

The Claimant had been seeing his chiropractor, Dr. Saulter for approximately three years at the time of the hearing. TR 49. Dr. Saulter adjusts the Claimant's neck and both shoulders, which relieves the Claimant's headaches and improves his vision. TR 33-34, 47. The Claimant also receives massage therapy in Dr. Saulter's office, which "loosens" the Claimant's neck and shoulder muscles so that the adjustments last longer. TR 35-36. The Claimant testified that the pain in his neck is reduced as a result of the treatments, but is not completely resolved. TR 35. Following treatment, the pain is significantly relieved for approximately one week, and at the end of a two week period, the pain is as severe as before the treatment. TR 51-54. The Claimant sees Dr. Saulter twice per month but stated he would see him more if he could afford to. TR 34. The Claimant testified that the chiropractic treatment is "[v]ery important" to him, because medications scare him. TR 56-57. The Claimant described the pain relief he obtains as "great." TR 57.

The Claimant testified that he has psoriasis, and that he has had it all his life. TR 30. However, he has "never paid much attention to it until, you know the last few years." TR 58. He reported that the condition clears itself in the summer, because sunlight helps, and is worse in the winter. TR 31. The Claimant testified that he has never been diagnosed with psoriatic arthritis by any treating physician. TR 32.

In 2005, the Claimant had gout in his left knee. TR 32. Dr. Harding drained the Claimant's knee and gave him a shot. *Id.* Since that time, the Claimant has had no problems with his knee. TR 33.

B. Medical Evidence

Occupational Health Associates of Maine

On April 17, 2000, the Claimant was referred by Atkinson to Peter Mason, D.O., of Occupational Health Associates of Maine, for treatment of his injury. CX 6 at 67; CX 10 at 147. Dr. Mason examined the Claimant and diagnosed an acute strain phenomenon of the bicipital muscle, with no evidence of a rupture. CX 6 at 67. The Claimant was seen again on May 2, 2000, with a diagnosis of an "acute strain phenomenon [to the] right biceps muscle with probable reinjury" due to lifting a truck tire. *Id.* at 70. He was referred to Occupational Health Services of Franklin Memorial Hospital as that was closer to his home. *Id.*

Central Maine Imaging Center and Franklin Memorial Hospital Radiology and Laboratory Reports

X-rays and an MRI taken in June 2000 documented that the Claimant had no abnormalities of the biceps muscle or tendon and had no fractures, dislocations or osseous abnormalities of the right elbow. CX1; CX2 at 2. The Claimant was seen again at Franklin

Memorial Hospital in March 2005 for knee pain. CX 2 at 4. X-rays of the left knee showed that the Claimant had some early degenerative spurring in the medial compartment. *Id.*

Franklin Memorial Hospital

Soon after the work injury on April 11, 2000, the Claimant treated with Franklin Memorial Hospital Occupational Health Department, Injury Management Program.[2] CX 3. On April 17, 2000, the medical notes document an injury to the bicep, with soreness at the muscular tendon joint. CX 3 at 5. According to the notes, the Claimant was sleeping well. *Id.* On April 26, 2000, the notes document increasing soreness, and that the Claimant appeared to have irritated the right shoulder and neck at the time of the injury. *Id.*

On May 9, 2000, the notes document a contusion of the right shoulder and a "bicipital strain of the muscle belly" with evidence of low grade bicipital tendonitis. *Id.* at 7. The Claimant was referred to physical therapy. *Id.*; *see* CX 8. An exam on May 19, 2000 noted great pain in the elbow, tenderness in the bicipital groove, impingement of the bicep, full motion of the neck without pain and no subluxation. CX 3 at 9. The Claimant was again referred to physical therapy. *Id.*; *see* CX 8. On June 8, 2000, the Claimant complained of pain in the elbow and that his shoulder was "somewhat uncomfortable." CX 3 at 12. On June 20, 2000, the Claimant was seen by William Lambert, M.D., whose notes document some painful limitation of the motion of the right shoulder, and biceps tendonitis within the bicipital groove. *Id.* at 17. As the Claimant continued to experience pain and weakness in the elbow Dr. Lambert ordered an MRI. Dr. Lambert also recommended that the Claimant continue physical therapy. *Id.* at 18; *see* CX 8. As noted above, the MRI of the right elbow was normal.

On July 18, 2000, Dr. Lambert noted that the Claimant had more pain in the elbow than the shoulder. CX 3 at 21. Shoulder pain and weakness of the right arm and shoulder were also noted. *Id.* He recommended that the Claimant "restart aggressive therapy program for stretching, range of motion and strengthening." *Id.*; *see* CX 8. The Claimant saw Dr. Lambert for follow-up on August 15, 2000. He noted increased pain in the shoulder, but decreased pain in the elbow and stated that the Claimant had a "painful arc syndrome with biceps tendonitis and impingement secondary to work related injury." CX 3 at 24. The Claimant was instructed to continue his therapy. *Id.*; *see* CX 8. On an August 29, 2000 visit, Dr. Lambert noted improvement in the elbow and arm strength, but rotator cuff impingements and a supraspinatus injury were also documented. CX 3 at 28. The Claimant was instructed to continue his therapy. *Id.*; *see* CX 8.

On September 27, 2000, it was noted that the Claimant's biggest complaint was his shoulder pain, which was caused by "old degenerative disease and probably supraspinatus tendinopathy." CX 3 at 34. Dr. Lambert had ordered an MRI of the shoulder which was performed on September 5, 2000. According to Dr. Lambert's record, the shoulder MRI showed evidence of old degenerative disease and probably supraspinatus tendinopathy. In assessing the Claimant's history, the diagnostic test results, and the medical treatment following the work injury, Dr. Lambert stated the Claimant had a "legitimate sprain or strain of his right elbow and

[2] The Claimant treated with several different medical professionals, including Joseph Conrad, PA-C, Gerald Hussar, PA-C, and William Lambert, M.D.

injury to the anterior muscles and joint capsule to the elbow with some tearing" which was "pretty much healed." *Id.* Dr. Lambert stated that the right shoulder was the Claimant's "biggest problem" but that there was probably no significant injury to the right shoulder from the April 2000 work accident, but rather that there was an older trauma aggravated by the injury and subsequent "babying" of the arm. *Id.* at 34. The Claimant was instructed to continue his exercise program for the right shoulder and elbow on his own. *Id.*; *see* CX 8.

On November 22, 2000, the Claimant was seen by Gerald Hussar, a physician's assistant, who noted that the Claimant's shoulder range of motion was improved, but that he was having tension headaches and cervical muscle pain. CX 3 at 40. The notes from the January 3, 2001 visit indicate that the Claimant was still having discomfort in the shoulder and neck, and had limited cervical range of motion, and "evolving myofascial type complaints." *Id.* at 43. On August 13, 2001, the notes document chronic right shoulder pain and myofascial pain at the neck, with delayed recovery syndrome. *Id.* at 51. The record from the September 17, 2001 visit reflects continued neck and shoulder pain, and improvement in the biceps. *Id.* at 52. The notes also document the Claimant's complaints of difficulty sleeping and driving, and "needles" in the left hand. *Id.* On this date, the Claimant was discharged from the care of the Franklin Memorial Hospital Occupational Health Department, and was encouraged to continue chiropractic care with Dr. Saulter due to the improvement seen with the treatment. *Id.* at 53.

Dr. Leslie Harding, M.D.

The Claimant submitted treatment notes from Dr. Harding, whom the Claimant testified was his long-term primary care physician. CX 4; TR 22. The first mention of psoriasis appears in the office note of June 10, 2003. *Id.* at 57. At that time, Dr. Harding noted a 5.0 by 4.5 centimeter patch on the Claimant's left elbow and a 1.0 by 1.0 patch on the Claimant's right elbow. *Id.* at 57. Cream was prescribed, and it was noted that sunlight would help the condition. *Id.* at 57.

On July 7, 2003, the Claimant saw Dr. Harding for neck pain and headaches. *Id.* Dr. Harding prescribed Darvocet-N, but did not treat the neck complaints further because the complaints were related to the workplace injury which required a referral. *Id.*

On February 25, 2005, the Claimant was seen for a swollen and painful left knee. *Id.* at 60. Psoriasis was also noted on this date. *Id.* at 61. Dr. Harding extracted thirty milliliters of serous fluid from the knee, which yielded needle shaped crystals, indicating gouty arthritis. *Id.* at 61. On March 18, 2005, Dr. Harding again noted arthritis of the left knee, with a moderate effusion. *Id.* at 61. Dr. Harding prescribed prednisone for the gout, to be taken as needed. *Id.* On May 31, 2005, x-rays were reviewed and the Claimant was diagnosed with mixed osteoarthritis and gout. *Id.* at 62. On October 24, 2005, Dr. Harding wrote the Claimant a letter stating that the left knee pain and swelling was due to "osteoarthritis of the left knee, which is chronic, and acute gout attack in the same joint, which has resolved." *Id.* at 55. The diagnosis was based on a joint fluid examination, which revealed gout, and an x-ray, which revealed osteoarthritis. *Id.* Dr. Harding ruled out psoriatic arthritis and rheumatoid arthritis because those "present first in the small joints of the hand and wrists, and [the Claimant did not] have this

pattern of arthritis." *Id.* Dr. Harding stated that no blood tests were necessary to confirm the diagnosis. *Id.*

On October 4, 2005, Dr. Harding noted psoriasis on the knees and elbows, and recommended tanning for the condition. *Id.* at 64.

Western Mountain Chiropractic & Sports Injury Associates/ Timothy Saulter, D.C.

The Claimant received chiropractic care and massage therapy from Western Mountain Chiropractic & Sports Injury Associates. CX 7. The first treatment record available is dated March 28, 2001.[3] *Id.* at 72. The notes indicate that the Claimant was experiencing neck pain, which he related to his work injury of April 2000. *Id.* On February 1, 2002, Dr. Saulter recommended massage therapy to the neck and shoulders one to two times per month for "neuromuscular re-education." *Id.* at 74. Dr. Saulter next recommended massage therapy on January 12, 2004 focusing on the cervical spine area, to reduce cervical pain, improve range of motion, and reduce the number of visits needed to correct a spinal misalignment. *Id.* at 76. The Claimant was seen approximately seventy-eight times by the practice, for chiropractic work and massage therapy between March 28, 2001 and December 20, 2004. *Id.* at 77-107.

Douglas M. Pavlak, M.D.

Dr. Douglas M. Pavlak, M.D. performed independent medical evaluations on the Claimant's behalf on April 8, 2002 and September 7, 2005. CX 9. Dr. Pavlak is a Diplomate of the American Board of Physical Medicine and Rehabilitation and the American Board of Electrodiagnostic Medicine. *Id.* at 124. He works with the Medical Rehabilitation Associates in Lewiston, Maine. *Id.*

On April 8, 2002, Dr. Pavlak examined the Claimant, reviewed his medical records, and obtained a history. *Id.* Dr. Pavlak noted that the Claimant had "persistent right shoulder pain and neck and shoulder girdle pain," but that his elbow was improved. *Id.* at 126. Dr. Pavlak opined that the Claimant had suffered a severe contusion and a hyperextension injury to the right elbow, a mild recurrent shoulder impingement which was a result of an underlying degenerative change aggravated by the workplace injury, and myofascial pain in the neck and shoulder girdles. *Id.* He opined that the Claimant's pain was caused by the workplace injury. *Id.* at 127.

On September 7, 2005, the Claimant was reevaluated by Dr. Pavlak. *Id.* at 128. Dr. Pavlak noted that the Claimant had very little medical treatment since he last saw him in 2002 with the exception of his twice monthly visits to Dr. Saulter. *Id.* at 129. The Claimant reported that his elbow no longer hurt, but was still weaker than pre-injury. *Id.* at 128. However, the Claimant reported that his neck and shoulder girdle "[hurt] him pretty much all of the time" and that the pain varied according to his activity. *Id.* The Claimant also reported disabling headaches associated with the pain, occasional numbness and tingling in the right arm and an episode of acute pain and inflammation of the knee which was resolved. *Id.* at 129. The Claimant denied any other extensive joint pain. *Id.* Dr. Pavlak noted that the Claimant had recurrent neck and shoulder girdle pain resulting from a mild recurrent shoulder impingement,

[3] Many portions of the records are illegible.

and secondary myofascial pain. *Id.* at 130-131. Dr. Pavlak hypothesized that the pain was "probably from long-term splinting from his shoulder pain." *Id.* Dr. Pavlak continued to believe that "the relationship between his neck and shoulder girdle pain and the injury is direct and causal…. There is really no compelling evidence that would suggest otherwise at this point. There is no intervening medical condition to which we can reliably [ascribe] his symptoms." *Id.* at 132.

Dr. Pavlak noted that the Claimant had "developed much more in the way of psoriatic lesions, but these do not correlate in any way with joint complaints as far as he is aware." *Id.* Regarding the possibility of psoriatic arthritis, Dr. Pavlak opined that

> …from a review of the records and speaking with [the Claimant] as well as examining him, it appears that he had a one-time left knee effusion and synovitis which responded very rapidly to the intra-articular corticosteroids. He had crystals retrieved from the joint fluid that were consistent with gout, so I think this is his diagnosis. He does have psoriatic lesions, but he really does not have the degree and extent of severe polyarthragalias and polyarthritis and synotvitis that I would expect for support of a diagnosis of psoriatic arthritis. He was able to make a fist and had no synovial swelling today, and I really do not think that one could really support a diagnosis of psoriatic arthritis based on his clinical presentation today, although this could have been different when he was seen by Dr. Mainen. Certainly blood work would rule this out.

Id. at 131. Dr. Pavlak noted that gouty arthritis was a "more than adequate explanation for the patient's left knee effusion." *Id.*

Dr. Pavlak opined that the chiropractic treatment the Claimant received was "probably cost effective since the medications I recommended would be similar if not perhaps even more extensive than his twice monthly chiropractic visits…I could not guarantee that [these medications] would necessarily be more effective at improving [F.F.]'s function more than his current treatment. Certainly his current treatment is within the realm of reasonability and necessity for his diagnosis." *Id.* at 131. However, Dr. Pavlak noted, the chiropractic and massage treatment is not curative, "but nothing for myofascial pain really is," and "nobody is going to cure him of his chronic pain, and all treatment would be aimed purely at keeping him from getting worse and sustaining his function." *Id.* at 131,133. Therefore, "palliative treatment chronically is indicated." *Id.* Dr. Pavlak noted that it would be preferable to get the Claimant off of pain medications, but indicated that the Claimant was not taking excessive amounts of pain medications. *Id.*

Dr. Pavlak opined that the Claimant had reached maximum medical improvement, probably as of the last independent medical evaluation on April 8, 2002. *Id.* at 132. Dr. Pavlak explained that the Claimant's condition had not changed much since the previous independent medical evaluation. *Id.*

Michael W. Mainen, M.D.

Dr. Michael M. Mainen, M.D., who is Board Certified in Occupational Medicine, performed independent medical evaluations of the Claimant on June 17, 2003, February 9, 2005, and November 16, 2005 on behalf of the Employer. EX 1; EX 2; EX 3.

As a result of the June 17, 2003 independent medical evaluation, Dr. Mainen diagnosed a "right distal biceps sprain or partial tear," "a chronic right shoulder rotator cuff tendonopathy by MRI scan," and "myofascial pain of the paracervical and shoulder girdle musculature." EX 1 at 7. Dr. Mainen opined that the slow development of the Claimant's neck pain was consistent with a very mild strain. *Id.* at 8. He also opined that the cause of the pain "may have been related to the patient's abnormal posturing as he tried to hold the right arm and shoulder immobile. Or, it may be connected only on a legal basis." *Id.* at 9. Dr. Mainen believed that the Claimant had improved in the preceding six months, and that the Claimant would continue to improve. *Id.* Lastly, Dr. Mainen was unable to provide a permanent impairment rating because the Claimant had "no neurologic evidence of dysfunction, no physical loss of motion in the area injured, and no objectively demonstrated permanent loss of function." *Id.* at 10.

At the February 9, 2005 independent medical evaluation, Dr. Mainen noted that the Claimant had developed extensive psoriatic skin lesions, some of which were several inches in diameter, and thick scaling and inflammation around the lesions. EX 2 at 3. Dr. Mainen also reported that the Claimant had developed multi-articular arthritis which affected his hips, knees, ankles, elbows, wrists and small joints of the hands. *Id.* As a result of the pain, the Claimant was unable to make a fist, stoop or squat. *Id.* The Claimant did not complain much about his shoulders during this exam. *Id.* As a result of the examination, Dr. Mainen diagnosed "psoriatic dermatitis," "multi-articular arthritis—most likely psoriatic arthritis," "history of right shoulder rotator cuff syndrome," and "history of paracervical and trapezial myofascial pain." *Id.* at 5. Dr. Mainen noted that the Claimant's prior complaints of shoulder and neck pain had "faded into the background, replaced by an extensive multi-articular arthritic condition." *Id.* Dr. Mainen opined that this condition bore no relationship to the Claimant's workplace injury, but that the "overwhelming likelihood" was that the Claimant had psoriatic arthritis, based on the "abrupt onset and severity of the psoriasis over the last two years." *Id.* at 5-6. Dr. Mainen recommended blood tests, x-rays, and aspiration of fluid in the knees to assess the arthritis. *Id.* at 6. In Dr. Mainen's view, there was "no value" in the Claimant continuing with the chiropractic or massage treatments, as psoriatic arthritis does not respond to such treatment. *Id.* at 6-7.

When the Claimant saw Dr. Mainen several months later on November 16, 2005, Dr. Mainen observed that the Claimant's arthritic symptoms were "significantly less severe than they were" at the last examination. EX 3 at 3. The Claimant still had pain in the elbows, shoulders, neck and back. *Id.* However, the Claimant had little or no pain in the wrists, hands, hips, knees, feet or ankles. *Id.* The Claimant was able to make a fist. *Id.* at 4. Dr. Mainen reported that the Claimant "was very tender to palpitation over the cervical spine and the upper thoracic spine." *Id.* at 5. Dr. Mainen noted that the Claimant's psoriasis was improved from the last exam. *Id.* at 4. The Claimant reported to Dr. Mainen that his psoriasis had cleared completely over the summer, but was coming back as the winter approached. *Id.* As a result of the exam, Dr.

Mainen diagnosed a "contusion or muscle strain of the right upper arm with development of rotator cuff syndrome of the right shoulder, resolved," and "psoriasis with multi-articular arthralgias and arthritis, most likely psoriatic arthritis." *Id.* at 5. Dr. Mainen stated that his primary diagnosis remained psoriatic arthritis because the Claimant's onset of arthritis was associated with an onset of psoriasis. *Id.* Dr. Mainen also did not consider gout a reasonable diagnosis for all the Claimant's arthritis symptoms because gout usually involves one joint while many of the Claimant's joints were affected, and because he did not consider "the aspiration of fluid and the examination under non-polarizing microscopy by a non-pathologist to be sufficient proof of the diagnosis in a patient who has never had a typical gouty attack of the great toe and who has a normal uric acid." *Id.* Dr. Mainen noted that psoriatic arthritis "runs a variable course," and that patients with the disease often have remissions in which they do not have any arthritis. *Id.* at 6. Dr. Mainen also questioned the determination that the Claimant's neck pain was associated with the workplace injury, as there was a long lag time between the injury and the pain, and because the neck pain could be explained by psoriatic arthritis. *Id.* at 7. Dr. Mainen again opined that the effects of the workplace injury had ended long ago, and that the most likely cause of the Claimant's pain was psoriatic arthritis. *Id.* at 7-8.

C. Cross-Motions for Modification

The Employer seeks an order for modification, claiming that there has been a change in the Claimant's physical condition, as his work related injuries have resolved, and his current disability results from an independent intervening cause. Er. Br. at 3-7. The Claimant seeks an order for modification, contending that his physical condition has deteriorated and that his disability is now permanent. Cl. Br. at 1-2.

A petition for modification under Section 22 of the Act is appropriate when, within one year of the last payment of compensation or rejection of a claim, a party-in-interest requests modification of a compensation award for mistake of fact or change in condition. 33 U.S.C. § 922. Section 22 is not intended to provide a back-door route to retry a case, or to protect litigants from their counsels' litigation mistakes. *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68, 73 (1999).

Modification based on a change in condition is granted where the claimant's physical condition has improved or deteriorated following entry of the award but before the request for modification. *See Rizzi v. Four Boro Contracting Corp.*, 1 BRBS 130, 133 (1974). The party requesting modification has the burden of proof in showing a change in condition. *See Vasquez v. Cont'l Maritime of San Francisco, Inc.*, 23 BRBS 428, 430 (1990); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168, 172 (1984). The Section 20(a) presumption is inapplicable to the issue of whether a claimant's condition has changed since the prior award. *Leach v. Thompson's Dairy, Inc.*, 6 BRBS 184, 188 (1977). When a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in the claimant's condition. *Jensen v. Weeks Marine, Inc. (Jensen II*), 34 BRBS 147 (2000), *decision and order on remand at* 346 F.3d 273 (2d Cir. 2003). This initial inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the claim within the scope of

Section 22. *Id.* If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in the claimant's physical or economic condition from the time of the initial award to the time modification is sought. *Id.* Once the petitioner meets its initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding. *Id.*

The Employer's Petition for Modification

The Employer, relying on the opinion of Dr. Mainen, argues that modification is appropriate in this case because there has been a change in the Claimant's condition, in essence, an improvement, as the effects of the Claimant's work related injuries have ended. Er. Br. at 3-6. The Employer asserts that the Claimant's current disability results from psoriatic arthritis, an independent intervening cause. *Id.* Consequently, the Employer argues, it is not liable for the payment of any benefits for the disability. *Id.* at 6.

The Claimant argues that the Employer is unable to show a condition warranting modification because the Employer does not allege that the Claimant's physical condition has changed or improved, or that there was a mistake of fact. Cl. Br. at 6. Although there is some obfuscation in the Employer's position, based upon my reading of the Employer's brief, the Employer alleges a change in the Claimant's physical condition, namely that the work related disability had resolved and that the current disability results from an intervening cause, i.e., psoriatic arthritis.[4]

As an initial matter, I must determine whether the Employer, as the party seeking modification, has met the threshold requirement for modification by offering evidence which demonstrates that there has been a change in the Claimant's condition. Dr. Mainen stated that the Claimant's present disability bears no relationship to his workplace injury, but was instead the result of psoriatic arthritis. EX 2 at 5-6. Dr. Mainen also opined that the effects of the Claimant's workplace injury had ended "long ago." EX 3 at 8. These opinions are sufficient to meet the Employer's threshold requirement of demonstrating that there has been a change in the Claimant's physical condition, namely that the work related disability had resolved and that the remaining disability results from psoriatic arthritis. I must now determine whether a modification order is warranted, by considering all of the relevant evidence to discern whether there was a change in the Claimant's physical condition from the time of the initial award to the time modification was sought.

The Employer claims that the Claimant's disability was caused by psoriatic arthritis, which the Employer contends is an intervening cause of the disability, and not the natural progression of the Claimant's workplace injury. Er. Br. at 3-6. The relevant inquiry is whether the disability is causally related to and is the natural progression and unavoidable consequence of the claimant's work related injury or whether a subsequent event constituted an independent and intervening cause, thus breaking the chain of causality between the work related injury and the

[4] The Claimant is correct that the Employer has not demonstrated an improvement in physical or economic condition as the Employer has not established that the Claimant has regained the ability to perform his job at the shipyard nor has the Employer established suitable alternate employment.

claimant's disability. *See Cyr v. Crescent Wharf & Warehouse Co.,* 211 F.2d 454, 457 (9th Cir. 1954); *Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646, 649-650 (1979); *see also Kooley v. Marine Indus. N.W.*, 22 BRBS 142, 146 (1989). The Employer, as the moving party, bears the burden of proof.

In this case, the Employer points to the reports of Dr. Mainen as evidence that the Claimant's current condition is caused by psoriatic arthritis, an independent and intervening cause for the Claimant's disability, and not the natural progression of the work injury, which was a biceps strain and tendonitis and bursitis of the right shoulder. Er. Br. at 4. In this regard, Dr. Mainen stated that the Claimant's diagnosis was "most likely psoriatic arthritis" and that this diagnosis was the "overwhelming likelihood." EX 2 at 5. The diagnosis was based on the "abrupt onset and severity of the psoriasis" and the contemporaneous onset of multi-articular arthritis which preceded the February 2005 independent medical evaluation. EX 2 at 5-6. Dr. Mainen discounted the possibility of gout in the Claimant's knee. Dr. Mainen recommended blood tests, x-rays and aspiration of the fluid in the knees to assess the Claimant's arthritis. However, no physician ever performed these recommended tests.

In support of its contention that the Claimant's current condition is the result of an intervening cause, the Employer states that as of February 9, 2005, the Claimant's "symptoms had significantly changed, with Dr. Mainen noting multi-articular arthritis in the employee's hips, knees, ankles elbows, wrists and small joints of the hands," whereas following the 2000 injury, the Claimant's main complaint was his right elbow pain, which was not a concern as of 2005. Er. Br. at 4. Thus, the Employer concludes that the Claimant's symptoms as of 2005 were completely different than those of 2000. *Id.* at 5. In my view, the evidence does not support the Employer's argument. First, the Claimant has complained of neck and shoulder pain consistently since April 2000. *See* CX 3 at 5. The Claimant's elbow/biceps pain, which was his main complaint immediately after the injury, has resolved, but the Claimant's disabling work-related shoulder and neck pain have not resolved. Even Dr. Mainen acknowledged that the Claimant's neck pain may be related to the immobility of the arm and shoulder which followed the workplace injury. EX 1 at 9. Second, although Dr. Mainen stated during his February 2005 examination that the Claimant had multi-articular arthritis in several joints, at the examination in November 2005, the Claimant did not report pain in the hips, knees, ankles, hands or wrists, but continued to report pain in the neck, shoulder and elbow, the areas of the original work injury. EX 2 and 3.

Dr. Mainen's opinion also depended heavily on his conclusion that the psoriasis and arthritis pain appeared suddenly between 2002 and 2005. However, the Claimant testified that he suffered from psoriasis his whole life. The Employer discounts the Claimant's testimony, noting that few medical records document the pattern of flare-ups in the winter and healing in the summer. Er. Br. at 5. Although the medical records do not discuss psoriasis prior to 2002, I find the Claimant's testimony on this point credible. Therefore, since Dr. Mainen's diagnosis depended in large part on the contemporaneous appearance of psoriasis and arthritis, his diagnosis is undermined by contrary evidence.

In addition, the Claimant's treating physician, Dr. Harding, opined that the Claimant did not have either rheumatoid arthritis or psoriatic arthritis because the Claimant did not have a

pattern of arthritis consistent with those conditions. He attributed the Claimant's left knee pain and swelling to osteoarthritis and an acute gout attack of the left knee, based on an examination of fluid from the knee and an x-ray of the knee.

Similarly, Dr. Pavlak also opined that the Claimant's current condition was not caused by psoriatic arthritis but was caused by the workplace injury. In September 2005, Dr. Pavlak attributed the Claimant's neck and shoulder myofascial pain to long term splinting of the arm. Dr. Pavlak did not think that the Claimant's symptoms could support a diagnosis of psoriatic arthritis because the pain and the psoriatic lesions did not correlate with each other, as the Claimant did not experience the degree of polyarthragalias and polyarthritis which normally corresponds with psoriatic arthritis, and because the knee effusion was adequately explained by an acute attack of gout. The Employer calls into question Dr. Pavlak's report because the Claimant "disclaimed any significant joint pain" after his benefits were called into question by Dr. Mainen's report. *Id.* I find the Claimant's report to his doctors credible. The Claimant was objectively better, as demonstrated by the lack of swelling in the hands during the November 2005 independent medical evaluation with Dr. Mainen and the September 2005 independent medical evaluation with Dr. Pavlak.

The reports of Dr. Pavlak and Dr. Mainen are both well reasoned but document two radically different diagnoses. On balance, I find that the Employer fails to meet its burden of establishing that the Claimant's current condition is the result of an intervening condition, psoriatic arthritis, rather than the natural progression of the work injury. As discussed, the Claimant's neck pain never resolved, the Claimant does not experience pain in all joints as one would expect with psoriatic arthritis and the Claimant's treating physician diagnosed gout as the cause of the incidence of knee pain, not psoriatic arthritis. In weighing and evaluating all of the record evidence, the administrative law judge may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. *Pietrunti v. Dir., OWCP* 119 F.3d 1035, 1042 (2d Cir. 1997). Dr. Harding has treated the Claimant for several years and I accord his opinion greater weight. The opinion of Dr. Mainen is further flawed because it is premised upon his belief that the psoriasis is a new development, a theory I have discounted based upon the Claimant's testimony. Lastly, the Employer, which as the moving party bears the burden of proof, never had a physician perform the tests recommended by Dr. Mainen to confirm the diagnosis of psoriatic arthritis. Therefore, I find that the Employer has not proven by a preponderance of the evidence that the Claimant's disability is related to psoriatic arthritis and not the workplace injury of April 2000.

The Claimant's Petition for Modification

The Claimant seeks an order of modification, claiming that since the award of temporary total disability benefits in 2002, the nature of his disability has become permanent. Cl. Br. at 4. As evidence of this claim, the Claimant points to the opinions of Dr. Douglas Pavlak. In April 2002, Dr. Pavlak diagnosed a "right elbow strain with likely secondary hematoma," a "[r]ecurrent shoulder impingement which is still symptomatic," and "[m]yofascial pain syndrome of the neck and shoulder girdles." CX 9 at 127. Dr. Pavlak did not comment on maximum medical improvement at that time because the issue of permanence was not raised during the first hearing. In September 2005, Dr. Pavlak opined that the Claimant had reached

maximum medical improvement. CX 9 at 132. Dr. Pavlak concluded that maximum medical improvement had probably occurred as of the last independent medical evaluation on April 8, 2002, because the Claimant's condition had not changed much since then. As discussed above, the Employer concedes that the Claimant may be totally disabled, but argues that the disability results from psoriatic arthritis, not from the work injury of April 2000. Er. Br. at 6.

As an initial matter, I must determine whether the Claimant, as the party seeking modification, has met the threshold requirement for modification by offering evidence which demonstrates that there has been a change in the Claimant's condition. I find that Dr. Pavlak's opinion that the Claimant has reached maximum medical improvement since the original decision in December 2002 is sufficient evidence to demonstrate a change in condition. Therefore, I must consider all of the relevant evidence of record to discern whether there was in fact a change in the Claimant's physical condition from the time of the initial award to the time modification was sought.

In this case, the Claimant claims that his disability has worsened from a temporary condition to one that is permanent. In determining the nature of a disability, two approaches have been utilized. The first "is to ascertain the date of 'maximum medical improvement.'" *Trask v. Lockhead Shipbuilding and Const. Co.*, 17 BRBS 56, 60 (1985) (citing *McCray v. Ceco Steel Co.*, 5 BRBS 537 (1977)). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915, 918 (1979). Under the second approach, a disability will be considered permanent if the claimant's impairment "has continued for a lengthy period of time and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968). The Claimant, as the moving party, bears the burden of proof.

Dr. Pavlak, who examined the Claimant both in April 2002 and in September 2005, opined in 2005 that the Claimant had reached maximum medical improvement, probably as of April 8, 2002. The Employer did not present any contrary evidence on this point. Therefore, I accept Dr. Pavlak's opinion that the Claimant reached maximum medical improvement as of April 2002. Additionally, as the Claimant has had this condition since his injury in since 2000, his injury has continued for a lengthy period and appears to be of lasting duration. Accordingly, I find that the Claimant has established that his disability is now permanent. Therefore, the Claimant has sustained his burden in showing a change in his physical condition, from temporary to permanent impairment as of April 8, 2002, and is entitled to a modification of Judge Roketenetz's order.[5]

[5] In terms of the extent of the Claimant's disability, the disability under the previous Decision and Order was found to be total. The Employer has not presented evidence that the Claimant can now perform his usual job nor did the Employer present evidence of suitable alternate employment. Thus, the Claimant remains totally disabled.

D. The Claimant's Request for Medical Benefits

The Claimant seeks payment of medical services provided by a chiropractor, Dr. Timothy Saulter, and other therapies provided in Dr. Saulter's office in the amount of $1200.00 and related travel expenses in the amount of $168.96. Cl. Br. at 10. The Claimant argues that the chiropractic services and other treatments were reasonable and necessary and causally related to the compensable injury. *Id.* I have rejected the Employer's argument that it is not liable for the expenses because they resulted from an intervening cause, and not the Claimant's compensable work injury. Er. Br. at 6-7. Alternatively, the Employer argues that the treatments were not reasonable and necessary, as the treatments were purely palliative. *Id.* at 7. Lastly, the Employer argues that Dr. Saulter, a chiropractor, does not qualify as a physician under 20 C.F.R. § 702.404 for purposes of reimbursement, because there is no evidence of a subluxation in the Claimant's spine, and because the Claimant was receiving adjustments to his shoulders as well as his spine. *Id.* at 7-8.

The Claimant argues that the chiropractic treatments have been reasonable and necessary and should therefore be reimbursed under Section 7 of the Act. 33 U.S.C. § 907. Dr. Pavlak has provided a well-reasoned report which indicated that the Claimant's treatments have been both reasonable and necessary for the Claimant's condition, as the treatments have improved the Claimant's pain and functional capacity, and are cost effective as compared to pain medicine. Additionally, the Claimant credibly testified that the treatments significantly relieved his pain. Dr. Mainen has opined that the treatments have no value because psoriatic arthritis does not respond to such treatment. I reject Dr. Mainen's opinion on this point, as I have found that the Claimant's disability results from his work related injury, and not from psoriatic arthritis. Therefore, I accept Dr. Pavlak's opinion that the treatments are reasonable and necessary.

Although I accept the Claimant's argument that his treatments with Dr. Saulter have been reasonable and necessary, I find that Dr. Saulter is not a physician as defined in 20 C.F.R. § 702.404. The regulation provides that the term "physician" "includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings." 20 C.F.R. § 702.404. Dr. Saulter is a chiropractor, and there is no evidence that the Claimant has ever had a subluxation of the spine. Indeed, the notes from Franklin Memorial Hospital on May 19, 2000 indicate that the Claimant did not have a subluxation. CX 3 at 9. Therefore, despite the fact that the treatment may be reasonable and necessary, the chiropractic treatments are not reimbursable because the treatments were not for the purpose of treating a subluxation of the spine.[6]

[6] The Employer makes two other arguments which are moot in light of my decision that the Claimant's chiropractic treatments are not reimbursable. First, the Employer argues that the chiropractic treatments are aimed at pain which is caused by psoriatic arthritis, an intervening cause of the Claimant's disability. As discussed above, I have found that the Employer failed to establish psoriatic arthritis. Additionally, the Employer argues that the treatments are not covered by Section 7 of the Act because the treatments are purely palliative and are not curative. However, the Benefits Review Board has held that an employer may be liable for treatment that is purely palliative, if the treatment is doctor recommended and reasonable and necessary. *Slade v. Coast Eng'g & Manu. Co.*, BRB Nos. 98-646 and 98-646A (February 2, 1999) (unpublished). Therefore, since the treatments were recommended by treating physicians at Franklin Memorial Hospital and by Dr. Saulter, and were reasonable and necessary as discussed above, the Employer's argument fails.

However, the massage therapy treatments provided by Dr. Saulter's office and recommended by Dr. Saulter may be reimbursable under Section 7 of the Act. Reversing a grant of summary decision, the Benefits Review Board held that massage therapy recommended by the Claimant's chiropractor and performed by a trained massage therapist before chiropractic therapy which would "help relax the Claimant's muscles thereby holding the spinal adjustments better, so Claimant's need for chiropractic care would be reduced in the long term" was not necessarily an alternative treatment prohibited by 20 C.F.R. § 702.404, and could be covered under Section 7 of the Act if the treatment was deemed reasonable and necessary. *Patillo v. Dir., OWCP*, BRB No. 01-0570 (March 31, 2002) (unpublished). The Board noted that 20 C.F.R. § 702.401(a) includes within the definition of medical care

> … medical, surgical, and *other attendance or treatment*, nursing and hospital services, laboratory, X-ray and other technical services, medicines, crutches, or other apparatus and prosthetic devices, and *any other medical service or supply…which is recognized as appropriate by the medical profession for the care and treatment of the injury or disease.*

Id. Additionally, the Board noted that many other services, including physical therapy and biofeedback therapy, are covered by the Act. *Id.* Thus, in that case, the grant of summary decision was reversed because there was a genuine issue of material fact as to whether the treatment was an alternative treatment prohibited by 20 C.F.R. § 702.404 and whether the treatment was reasonable and necessary. *Id.*

Applying the Board's reasoning to this case, I find that the Claimant's massage therapy treatment should be covered by Section 7 of the Act. First, I find that the treatment in question is not an alternative treatment as prohibited by 20 C.F.R. § 702.404, which states that "[n]aturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term 'physician' as used in this part." Massage therapy is not listed in the regulation as a prohibited form of alternative treatment, and is a mainstream, recognized therapy. Second, I find that the treatment is reasonable and necessary. Dr. Saulter, who is one of the Claimant's treating physicians, recommended the treatment for neuro-muscular re-education, to reduce cervical pain, improve range of motion and reduce the number of chiropractic visits necessary. The Claimant testified that the massage therapy made the chiropractic treatments more effective and helped his pain. Dr. Pavlak likewise opined that the massage and chiropractic treatments were reasonable and necessary. Therefore, I find that the massage therapy is reasonable and necessary and the Employer is responsible for payment of this therapy and the travel expenses to and from these appointments. *See* 20 C.F.R. § 702.401 ("Medical care shall include…the reasonable and necessary cost of travel incident thereto").

E. Compensation Due

The Claimant has established that he is entitled to permanent total disability benefits beginning on April 8, 2002. The Claimant's average weekly wage at the time of injury was $1,097.55. Under Section 8(a) of the Act, the Claimant is entitled to 66 2/3% of the average weekly wage during the continuance of his disability. 33 U.S.C. § 908(a).

Additionally, under Section 7 of the Act, the Claimant has established that he is entitled to payment of his massage therapy with a certified massage therapist and related travel expenses. 33 U.S.C.§ 907. Accordingly, the Employer is liable for reimbursement of $760.00 for massage therapy from a licensed or certified massage therapist, and $168.96 for travel to and from these appointments.[7] *See* CX 11.

F. Attorney's Fees

Having successfully established his right to modification and medical care, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). The Claimant's attorney, James W. Case, submitted a fee petition on March 6, 2006. My Order will grant the Employer fifteen days from the entry of this decision and order to file any objection.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, including the parties' stipulations, the following order is entered:

1. The Employer shall pay to the Claimant permanent total disability payments pursuant to 33 U.S.C. § 908(a) for his work-related neck and shoulder injury from April 8, 2002, the date of maximum medical improvement, at a rate of 66 2/3% of the Claimant's average weekly wage of $1,097.55;

2. The Employer is entitled to a credit for temporary total disability benefits paid since April 8, 2002 to the Claimant pursuant to 33 U.S.C. § 908(b) for the Claimant's work related elbow, shoulder and neck injury;

3. The Employer is liable for payment of the Claimant's massage therapy appointments related to his work-related injury in the amount of $760.00 and related travel expenses in the amount of $168.96, pursuant to 33 U.S.C. § 907;

4. The Employer shall continue to provide the Claimant with reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related shoulder and neck injuries may require pursuant to 33 U.S.C. § 907;

5. The Employer shall have 15 days from the entry of this decision to file any response to the Claimant's attorney fee petition;

[7] The Claimant drove twenty-four miles roundtrip for each massage therapy appointment. On September 8, 2005, travel expense inexplicably jumps from $9.72 to $11.64. However, as the Employer did not object to the travel costs, I accept the Claimant's stated travel costs.

6. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts